IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1903.

No. .....

HY-UTSE-MIL-KIN,
Appellant.
vs.
PHILOME SMITH,
Appellee.
(18,824)

BRIEF OF APPELLEE.

In order to determine the issues in this suit it will be necessary to review the treaties and laws of the United States relating to and affecting the Indians now residing upon the Umatilla Indian Reservation in Umatilla County, State of Oregon.

TREATY.

On June 9, 1855, a treaty was made and concluded between Isaac I. Stevens, Governor and Representative of Indian Affairs for the Territory of Washington, and Joel

Palmer, Superintendent of Indians occupying lands partly in Oregon and partly in Washington Territory, on the part of the United States, and the Walla Walla, Cayuse and Umatilla bands of Indians.

That treaty was ratified by the United States Senate March 8, 1859, and was proclaimed April 11, 1859.

Article 1, ceded all the lands then claimed by said Indians to the United States, but provides that a certain described tract "be set aside as a residence for said Indians, which tract for the purposes contemplated, shall be held and regarded as Indian Reservation," and all of which tract "shall be set apart and, so far as necessary, surveyed and marked out for their exclusive use." That no white person was to be permitted to reside upon the same without permission of the agent and superintendent. The said Indians agreed to remove and settle upon the same.

Article 2, provides for the payment to the Indians of various sums of money.

Article 3, provides for expenditure by the United States of a large sum of money for buildings, etc., on the reservation.

Article 4, provides for the erection on the reservation of certain mills, shops, etc.

Article 5, provides for the building of dwelling houses, etc., for the chiefs of the three tribes.

Article 6, provides that the President may from time to time at his discretion, cause the whole or any part of the tract to be surveyed and assigned to each of the said Indians as may desire to locate thereon.

Article 7, provides that the annuities of the Indians shall not be taken to pay the debts of individuals.

Article 8, provides that the confederated bands acknowledge their dependence on the government of the United States.

Article 9, provides against the evils of intemperance among the Indians.

Article 10, provides for roads, highways and railroads.

Article 11, provides for the going into effect of the treaty.

Under the said treaty the United States, soon after it was ratified by the Senate of the United States, proceeded to establish said Indians upon said reservation, and has ever since maintained the same upon said reservation.

ACT ADMITTING OREGON AS A STATE.

On February 14, 1859, Congress passed an act admitting Oregon as a state, in which act no reference is made to any Indian reservations, neither is there any provision in the Constitution of the State of Oregon reserving to the United States the jurisdiction of Indians or of Indian reservations.

ALLOTMENT ACT.

On the 3rd day of March, 1885, Congress passed a law applying to this reservation (23 Stats. L. 340) allotting certain lands of this reservation to the individual members of the respective tribes.

That act provides that the President of the United States shall cause lands to be allotted to the confederated bands of Cayuse, Walla Walla and Umatilla Indians residing upon the Umatilla Indian Reservation out of agricultural land as follows:

"To each head of a family 160 acres, etc."

"*Allotments to heads of families and to children 18 years of age belonging to families shall be upon the selection made by the head of the family, etc.*"

Before any allotments are made, a commission of three disinterested persons, to be appointed by the President, shall go upon said reservation and ascertain, as near as may be, the number of Indians who will remain upon said reservation, and who shall be entitled to take lands in severalty thereon, and the amount of land required to make the allotments; and thereupon such commission shall determine and

set apart so much of said reservation as shall be necessary to supply agricultural lands for allotments in severality, etc. Said commission shall report to the Secretary of the Interior the number and classes of persons entitled to allotments, as near as they may be able to, etc."

"That before this act shall be executed in any part the consent of said Indians shall be obtained, etc."

"That the Secretary of the Interior shall have power to make needful rules and regulations to carry into effect the provisions of this act, etc."

In 1894, Congress passed the following law, viz:

"That all persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of lands under any law of Congress, or who claim to be so entitled to land under any allotment act, or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotments or any parcel of land to which they claim to be lawfully entitled by virtue of an act of Congress, may commence and prosecute or defend any action, suit or proceeding in relation to their rights thereto, in the proper circuit court of the United States, and said circuit courts are hereby given jurisdiction to try and determine any action, suit or proceeding arising within their respective jurisdictions, involving the right of any person, in whole or in part of Indian blood or descent, to any allotments of lands under any law or treaty."

"And the judgment or degree of any such court in favor of any claimant to any allotment of lands shall have the same effect as if such an allotment had been made and approved by him." (Sup. Rev. St. Vol. 2, Page 246).

From the evidence in this case and the pleadings the following questions of law are presented:

FIRST:—Was plaintiff entitled to the allotment upon the Umatilla Indian Reservation?

SECOND:—Did the act of taking possession of the land and improving it and notifying the commission constitute

a selection as contemplated by the act of congress March 3, 1885.

THIRD:—Did such a selection give a prior right to the appellee to have the land thus selected, occupied and improved by her, allotted to her?

Primarily the first question was an *ex parte* question in which the appellant was not and could not be at all interested, but which interested the appellee on the one side and the Indians or the Government of the United States, which represented the Indians as a whole, on the other. This question was tried out and determined in the Department of Indian Affairs, and resulted in the said department deciding and holding that the appellee and her children were Indians and were entitled to an allotment upon the said Umatilla Indian Reservation, and from the evidence taken before the Master, and the facts found and reported, taken together with the facts found and decided by the department, no court can come to any other conclusion than that the appellee in this case was an Indian woman of full blood, and was a member of the Umatilla band of Indians and was residing upon the Indian reservation at the time the allotments were made, and that the evidence, and the findings of the Master and the court below bring her under all the requirements of the act of March 3, 1885, giving her and her children a right to such allotment, and that she was so recognized and admitted to be so entitled by the Indians residing upon the Umatilla Indian Reservation themselves and by the United States agent in charge of said reservation. The Interior Department has so held in this case, *ex parte*.

"Contemporaneous construction of a statute by the Executive Department charged with its execution is entitled to great weight and ought not to be overturned unless clearly against the intention of Congress."

U. S. vs. Philbrick, 120 U. S. 52.

U. S. vs. Johnson, 124 U. S. 236.

And in particular as to who are Indians the Courts follow the decisions of the Department:

U. S. vs. Holladay, 3rd. Wall 419.

In re Kansas Indians, 5th. Wall 737.

U. S. vs. Boyd, 68 Fed. 560.

U. S. vs. Higgins, 103 Fed. 348.

Farrell vs. U. S., 110 Fed. 942.

Whether she was a Umatilla Indian in blood or not is immaterial so long as she was an Indian woman in whole or in part born within the United States and was recognized by them as one of their number.

Sloan vs. U. S., 95 Fed. 193.

U. S. vs. Higgins, 103 Fed. 348.

The second question is, did the appellee select the lands in controversy prior to the selection and allotment to the appellant.

The correct answer to this question depends upon the proper understanding of the word "selection," and the meaning of that word as used in the act of Congress of March 3, 1885. Under that law all allotments had to be made upon the "selection" of some person. The allotting commissioners had no power to make selections. That act was left to the Indians themselves in all cases, except orphans, in which case the agent in charge of the reservation was authorized by the act to make the selection for them. Now the word "selection" is defined to be anything selected, chosen, picked out of a number; (Century Dictionary). Therefore, in this statute it means certain described tracts of land chosen, selected or picked out of the numerous other tracts of land upon the

Umatilla Indian Reservation by the person authorized by the act so to do. The statute does not in terms define what a selection must consist of or when it shall be made. A tract of land is selected when it is designated or set apart for any particular purpose.

In re Henkel, 2 Saw 305.

Hence the question of selection is one of fact to be determined from the evidence in the case.

The evidence in this case shows conclusively, and is not disputed in any manner, that the appellee in this case, five years or more prior to the allotments upon the Umatilla Indian Reservation, went upon this tract of land and selected it, chose and picked out of the other tracts of land upon the Reservation as the land which she desired to be allotted to her as her individual portion of the Umatilla Indian Reservation. This she did under the guidance and the approval of the Indian Chief Homily, who was cheif of the Walla Walla band of Indians at that time, and with the knowledge and approval of the United States Indian agent then in charge of the Umatilla Indian Reservation. She not only selected or chose it but as the evidence of that selection and choosing she took actual possession of it, first, by plowing a furrow around it, and then by enclosing it with a substantial fence, and otherwise improving it in connection with the lands which she selected at the same time for her minor children, and then when the allotting commissioners arrived, she properly notified them of her selection, and they refused to allot her, and thereupon the Department at her instance made a thorough examination into the matter and into her rights upon the said reservation, and after an investigation decided at first that she was not entitled to an allotment at all, but afterwards upon reconsideration and a more thorough investigation of the facts and of the law the Department decided that *She and her children were entitled to allotments upon the said reservation, but that her prior selection*

and improvements upon the land did not give her any prior right or equity in or to the land thus alloted, which conclusion we think is not only a very erroneous one but a very unjust and inequitable one. If appellee was entitled to an allotment and knowing that and for that purpose selected this land, fenced it and improved it to the extend of $500.00 or $600.00, what rights and jurisdiction had the allotting commissioners to take that land and give it to some other person, who must have had notice of her claim? What right had the appellant to select that land when it was in the actual possession of appellee? The allotment act did not give the appellant the right to select the appellee's land, and the allotment commissioner had no authority to determine which of the claimants was entitled to it, because under the law as it then stood that was the province of the Secretary of the Interior (act of March 3, 1885) but the commission usurped that authority and arbitrarily allotted the land to the appellant, and the duty of determining the matter was devolved upon the court by act of Congress, and we claim that the appellee is entitled, under the act of March 3, 1885, and under the act of August 15, 1894, to have this matter determined in the first instance by the Circuit Court of the United States for the District of Oregon, and as a matter of law the appellee claims that her selection and actual settlement and possession of the premises gives her a superior and equitable right to said premises.

POINTS.

It is a well founded principle of law that when one person is in the actual and peaceable possession of government land no other can obtain a superior right thereto. This is a principle that has been applied in all classes of public lands under all laws even to Indian lands and was first announced in the leading case of

Atherton vs. Fowler, 96 U. S. 513.

which has been cited and approved in many different kinds of cases, and among them are

Hosmer vs. Wallace, 97 U. S. 575.

Quimby vs. Coulen, 124 U. S. 423.

DelMonte vs. Last Chance, 171 U. S. 32.

Tustin vs. Adams, 87 Fed. 360.

U. S. vs. LaChappelle, 81 Fed. 152.

By referring to appellee's "Exhibit A" (Record Page 110) the Court will find that the Department found all the facts in this case to be the same as those found by the Master, except as to the value of the improvements, but the Honorable Secretary of the Interior held in his decision as a conclusion of law that the prior possession and improvements of the appellee's did not give her any superior equities, which, as a conclusion between the government and the trespasser or a mere settler without any rights, may be correct, but as between two claimants of public lands of any kind or nature, it has long been an established rule of law that the first in time is the first in right.

Shepley vs. Cowen, 91 U. S. 330.

Worth vs. Branson, 98 U. S. 118.

McCreery vs. Haskell, 119 U. S. 327.

Aside from all the above authorities we claim that the plain reading of the statute (Act. March 3, 1885) gives the appellee superior equities because it was evidently the intention of Congress to put the Indians in a position whereby

they might protect their possessions, their homes and their families. The heads of families were authorized and empowered to make their selections, and the law in its scope and effect is very like the homestead law, and the allottees are to be regarded very much as homesteaders.

State vs. Norris, 55 N. W. R. 1086-1089.

The first assignment of error is that the Court erred in overruling the appellant's demurrer, which was a general demurrer, to the sufficiency of the complaint and to the jurisdictio. of the Court over the subject matter of the suit. (See Page 14 of Record).

Excepting for the act of Congress of August 15, 1894, (28 Stats. 305) which is quoted above *in extenso* this demurrer would have been well taken because prior to that enactment the Executive Department of the Government would certainly have exclusive jurisdiction of all matters concerning the land in question, but the law was passed for the express purpose of changing that state of affairs and for providing a remedy in the courts for just this class of cases.

Sloan vs. U. S., Supra.

There is no contention that the complaint does not bring the appellee within the provisions of that act, hence there was no error in overruling the demurrer.

The second assignment of error is to the first finding of fact by the Commissioner, which is to the effect that the appellee is a full blood Indian woman and a member of the Walla Walla band of Indians, and resides upon the Umatilla Indian Reservation, (See Page 32 of Record); and the evidence to support that finding of fact is direct, positive and is not controverted by any other evidence. (See W. A. Smith's testimony Pages 58 and 59 of Record). (Mrs. Philomme Smith Page 81 of Record). (Charles Chalifoe Page 94 of Record). (Susanne Gagon Page 125 of Record). This evi-

dence also shows conclusively that the appellee was not only a full blood Indian woman, but that she and her mother were connected by blood with the Walla Walla and Cayuse Indians and there is no evidence disputing or tending to dispute this much of the finding.

Being of Indian blood, whole or mixed, and born within the United States, it is of no importance as to what tribe or band she sprung from. She might have been a Sioux or Ponca or California Digger Indian so long as she was an Indian woman in whole or in part and actually belonged to either of the tribes or bands of Indians located upon the Umatilla Indian Reservation. This proposition is fully settled by authorities.

Sloan vs. U. S. 95 Fed. 193.

U. S. vs. Higgins, 103 Fed. 348.

That being true it only remains to ascertain whether she was a member of the Walla Walla, Umatilla or Cayuse bands of Indians, and of this there can be no question because the evidence is clear and undisputed, and as we claim is settled by the Indian Department of the United States after the most careful and searching investigation as to all the facts leading up to the question (See Record Pages 111 to 120 inclusive). But aside from this finding and determination the evidence establishes the fact absolutely that Homily and Showaway, the chiefs of the Walla Walla and Cayuse bands of Indians recognized Mrs. Smith and her children as Indians belonging to their bands and permitted them to reside upon the reservation with them and pointed out and directed her to the place where to select the land for her allotments, including the land in controversy, and at the same time the then United States Indian agent acquiesed and also assisted the appellee in selecting her said land. (Record Pages 60 and 90).

These facts being true and undisputed the question as to whether or not Mrs. Smith is an Indian woman belong-

ing to the Umatilla Reservation and entitled to allotment under the act of March 3, 1885, should be considered settled by the decision of the Department.

The third specification of error is not supported at all except by the uncorroborated evidence of the appellant and he is controverted by the testimony of the appellee, her husband and Brisbois, and therefore, the weight of evidence is clearly with the appellee, and this Court must sustain this finding under the rule that when the evidence is conflicting the appellate court will sustain the findings of the Master or Referee in Chancery.

Nessley vs. Ladd, 29 Or. 354.

Judge Bellinger so held in his opinion in this case and that is the general rule followed by all the appellate courts.

The fifth, sixth and seventh assignments of error allege error in the Court overruling the appellant's exceptions to the twelfth, thirteenth and fifteenth findings of fact. Each one of these findings are supported by the undisputed evidence, not only of the appellee and her witnesses, but that of Mr. Eddy, one of the witnesses for the appellant, who was one of the commissioners who was on the ground at the time the allotment was made to the appellant.

The eighth specification is that the court erred in decreeing that the report of C. H. Carter, special examiner in Chancery be confirmed.

This is a general specification covering all the assignments of error. If there is no error in any of the particular findings objected to, and to which exceptions were made, there certainly could be no error in sustaining the findings as a whole. But if there is error in any of the particular specifications then to that extent would there be error in sustaining the report as a whole, and as we have pointed out to the

Court that each assignment taken is not well founded, there is no necessity of considering this specification. In fact it is no assignment of error.

The ninth, tenth and eleventh assignments of error are entirely superfluous inasmuch as matters therein objected to depend entirely upon whether or not the Court had jurisdiction in this case and of that there can be no doubt since the statute is explicit, and this matter of jurisdiction was fully discussed under the demurrer. But we will add here that this action is purely statutory and whether or not the Court has jurisdiction depends upon whether or not we have brought our appeal within the requirements of that statute, and of that there can no doubt.

If the Court has jurisdiction to determine whether or not the appellee is entitled to the land in controversy as her allotment it certainly has jurisdiction to require anything to be done, or not to be done, necessary to enforce its decree and protect it. The court has that power inherently.

The twelfth specification of error is that the court erred in rendering any decree because the United States of America was a necessary party. This point was first raised in the Court of Appeals and was not argued or presented to the lower court, and the argument presented to sustain that contention seems to us to be very futile. The only fact upon which it can be based is that the legal title to the land in controversy is in the United States, and that the United States is an express trustee, which fact might ordinarily in ordinary actions or suits if the parties were all private individuals and the action not one peculiarly statutory requiring that the trustee should be made a party in order to settle the whole case at one time, but in this case the Government, which is the trustee holding the legal title in trust is not only the trustee but is the soverign power and cannot be made a party without its consent, which, at the time this suit was brought, had not been obtained or provided for by any act of Congress, but Congress had provided a way for this matter to be adjudicated so that it could be bound by the decree.

The act under which this suit was brought provides that a decree may be filed with the Secretary of the Interior, and when so filed it shall be binding upon the Government. (See act of August 15, 1894).

In the court below District Attorney Hall in his brief and argument undertook to limit the purview of the statute under which this suit was brought within very narrow limits claiming that it was not the intention of Congress to include such cases as this, but that it was intended only to establish allotments claimed by individual Indians to which they had been denied by the Government and which had not been allotted to any other Indians. This contention was based upon the fact that section six of the allotment act of 1885 conferred jurisdiction upon the Secretary of the Interior, and that the same was not repealed by the act of 1894. That until patent had issued the Department of the Interior had exclusive jurisdiction, hence the action or suit was prematurely brought. This contention of Mr. Hall is refuted by the express terms of the act itself and the decision of Judge Shiras in (Sloan vs. U. S., Supra) is clearly against him. Section six of the act of 1885 is not repealed by the act of 1894, but the intention of Congress in that act was doubtless to confer upon the Courts paramount and exclusive jurisdiction to the same extent as they would have had, had patent issued.

We introduced a certified copy of the decision of the Secretary of the Interior to prove what facts had been established by the Department in Mrs. Smith's case to cover the rule that generally the courts are bound by the facts as found by the Department. That decision was in a proceeding between Mrs. Smith and the Executive Department and was made after a thorough investigation wherein much evidence was taken and was only *ex parte* as to Hy-utse-mil-kin. The Department found and declared Mrs. Smith to be an Indian woman and entitled to an allotment upon the Umatilla Indian Reservation, and that was a conclusion entirely between her and the Government, which has been settled in her favor.

The only question in this case is whether she had selected these lands prior to the selection made by Hy-utse-mil-kin, upon which point the Department also found in her favor, but it said that it gave her no superior rights or equities to this land, but we contend that the possession of Hy-utse-mil-kin in this case is that of a holder of the legal title as trustee for Mrs. Smith, and his allotment should have been her allotment.

In the argument before the Court of Appeals, District Attorney Hall contended that the marriage of Mrs. Smith with a white man and a citizen of the United States changed her status as a tribal Indian, and constituted her a citizen of the United States, entitled to all rights and privileges as such by reason of which she could claim no rights as a member of the Indian tribes.

Excepting for the act of Congress August 9, 1888 (Sup. R. St. 2nd Ed. Ch. 818 and 608) the point might be well taken, but that act expressly provides that such a marriage shall not deprive the Indian woman of her rights as a member of the tribes.

We most respectfully submit this case to this Honorable Court.

R. J. SLATER AND J. T. HINKLE,

ATTORNEYS FOR APPELLEE.